

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LAKEWOOD ENGINEERING AND
MANUFACTURING COMPANY

and

13-CA-41445

UNITED ELECTRICAL, RADIO &
MACHINE WORKERS OF AMERICA (UE),
LOCAL 1159

Colleen J. Carol, Esq., for the General Counsel.
William R. Sullivan, Jr., Esq., and
Michael P. Palmer, Esq., of Chicago, Illinois,
for the Respondent.
Leah Fried, of Chicago, Illinois, for the Charging
Party.

DECISION

Statement of the Case

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Chicago, Illinois, on April 26 and 27, 2004. The charge was filed October 27, 2003,¹ and the complaint was issued December 18.

The complaint alleges that the Company suspended two of its employees, Martha Jaramillo and Alejandro Corcoles, because those employees concertedly complained about their working conditions and in order to discourage its employees from engaging in such concerted activities. The General Counsel asserts that this conduct violated Section 8(a)(1) of the Act. The Company filed an answer, denying the material allegations of the complaint.

As described in detail in the decision that follows, I conclude that the General Counsel has met his burden of establishing that Jaramillo and Corcoles engaged in concerted activity and that this activity was protected within the meaning of Section 7 of the Act. I further find that the Company suspended these employees due to their participation in this protected, concerted activity. As a result, I determine that, by suspending these employees for engaging in protected, concerted activity, the Company has violated Section 8(a)(1) of the Act.

On the entire record,² including my observation of the demeanor of the witnesses, and

¹ All dates are in 2003 unless otherwise indicated.

² There are some errors of transcription. At Tr. 32, l. 13, the reference is to the "concerted"
Continued

after considering the briefs filed by the General Counsel and the Company, I make the following

Findings of Fact

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I. Jurisdiction

The Company, a corporation, manufactures heaters and fans for personal, commercial, and industrial uses at its facility in Chicago, Illinois, where it annually purchases and receives goods valued in excess of \$50,000 directly from suppliers located outside of the State of Illinois. The Company admits³ and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

A. *The Facts*

Lakewood Engineering and Manufacturing Company is a privately-held corporation organized in Illinois. It has existed for over 50 years and employs approximately 280 persons. The Company makes heaters and fans at its two Chicago plants. Its operations include the molding of plastic parts, fabrication and finishing of metal components, and assembly, packaging, and shipping of the products.

For approximately 8 years, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Local 743, represented the Company's production employees. The most recent collective-bargaining agreement between the Company and Local 743 had a term extending from March 12, 1999 through January 1, 2003. (R. Exh. 1.) On October 15, 2002, the United Electrical, Radio & Machine Workers of America (UE) filed a petition seeking to represent the bargaining unit. The Regional Director scheduled an election that was held on February 24 and 25. The ballot included three options: no union representation, representation by Local 743, or representation by the UE. None of these options received a majority of ballots. As a result, a runoff election was held on April 24. In a close vote, a majority declined union representation. There were 8 challenged ballots. In addition, the UE filed three objections to conduct affecting the election. On April 30, 2004, the Board issued a decision⁴ overruling two of these objections and remanding the representation case to the Regional Director to resolve the remaining objection and the outstanding ballot challenges. As a result of this history, all parties agree that during the period at issue in this trial, no union represented the bargaining unit members.

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Martha Jaramillo and Alejandro Corcoles are two longtime employees of the Company. Jaramillo has worked for the Company for 23 years and is currently employed as an assembler. Corcoles has been employed by the Company for 25 years and is also an assembler. They are both assigned to the first shift, commencing at 7 a.m., and terminating at 3:30 p.m. The shift includes a 30-minute lunch period and 2 break periods of 10 minutes each. Lunch is taken at

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nature of the activity. At Tr. 41, l. 15, the witness testified that at "8:50" in the morning, the supervisor indicated that the production line would be shut down. Finally, at Tr. 138, l. 3, the reference is to the "concertedness" of the activity. The remaining errors of transcription are not significant or material.

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³ See the Company's answer, p. 2. (GC Exh. 1(e).)

⁴ *Lakewood Engineering & Mfg. Co.*, 341 NLRB No. 101 (2004).

noon. All of the witnesses, employees and managers alike, agreed that the breaks are customarily taken at 9:30 a.m., and 2 p.m.⁵

5 There was general agreement that some employees eat their luncheon meal during the morning break. The majority of employees eat this meal during the noon hour. In either event, the Company maintains a rather unique custom concerning the preparation of lunches. Instead of offering hot meals for purchase or requiring their employees to eat cold food, the Company assigns an employee to the cafeteria for the purpose of heating food brought into the plant from
10 the employees' homes. That employee, Socorro Reyes, testified that the employees mark their lunches with tape, indicating the time that they wish to eat, either 9:30 or 12:15. The lunches are left in the cafeteria prior to the beginning of the work shift. Reyes places those lunches marked for consumption at 9:30 into the oven at 7:10.

15 The events at the heart of this controversy involve the scheduling of the first break on September 19. On that day, Jaramillo and Corcoles were assigned to work on Line 12. Twenty-two other employees were also assigned to this production line, assembling industrial heaters. Jose Noyola was the supervisor in charge of this line.

20 As was customary, work commenced at 7 a.m. At 8:45, Noyola noticed that the line was running short of grills for the heaters. He reported this problem to his superior, Plant Manager Francisco Valdez. Valdez went to the paint department where the grills were being painted in preparation for the assembly process. He learned that it would be 45 minutes to an hour before the grills would be ready for assembly by the workers on Line 12. As Valdez put it, "[t]hat is
25 when I had realized that we had a problem." (Tr. 225.) He telephoned Noyola and instructed him to,

30 talk to the people [on Line 12] and tell them about the problem,
 explaining that we had a problem and to please call a break
 earlier.

(Tr. 226.) In other words, Valdez instructed Noyola to direct the Line 12 employees to take their morning break in advance of the normal 9:30 time.

35 Noyola proceeded to carry out this instruction at approximately 8:50 a.m. The line had already ceased production due to the lack of grills. He testified that he told the workers, "what my supervisor had said that they should take the break while the material arrived." (Tr. 200.) Noyola reported that Jaramillo responded by observing that, "it was not their fault that the material was missing." (Tr. 200--201.) Noyola further related that Jaramillo and Corcoles,
40 "talked to the people [on Line 12] and they said that it was not their fault and they were not going to move." (Tr. 202.) He also testified that Corcoles expressed concern that the employees' lunches would not be ready to eat due to the early break time. Noyola told Corcoles that the lunches should be ready by 9 a.m. At this point, Noyola observed that approximately half of the employees had left the area of the production line and the remainder had stayed
45 there.

The evidence demonstrated that it is impossible to attach any particular significance to

50 ⁵ The only formal provision regarding the scheduling of the breaks was contained in the collective-bargaining agreement that expired on January 1. It provided that employees would "receive a paid ten (10) minute break during the first half of [the] regular shift and another paid ten (10) minute break during the second half of [the] regular shift." (R. Exh. 1, p. 14.)

employees' decisions to remain by the line or depart at this time. Both employees and managers agreed that during breaks some employees go to the cafeteria, others visit the bathroom, while still others remain standing at the line, often talking to coworkers. There is no company rule or policy mandating any particular employee behavior during the break periods.

In their testimony, Jaramillo and Corcoles confirmed much of Noyola's account of the events at issue, but added additional details from their perspective as employees. Jaramillo testified that upon hearing Noyola order an early break time, many employees reacted unfavorably, because they "had to eat their lunch cold because it was not heated." (Tr. 19-20.) She agreed that she complained to Noyola that, "it was not fair, that we are paying for the mistake they [the managers] made." (Tr. 20.) She also testified that other employees, including Margarita Lopez and Marta Marcila Alvarez, told Noyola that he should have Valdez speak to them because of the problem of cold lunches. Jaramillo testified that, after waiting for about a minute, she went to the bathroom and returned to the line in about 3 minutes.⁶

Corcoles also testified that Noyola's announcement was greeted with an unhappy response. Employees began talking among themselves, "[s]aying that it was not okay . . . [b]ecause they were going to eat their lunch cold." (Tr. 73.) He raised the issue with Noyola, but was told that it was "orders." (Tr. 93.)

Another employee, Raul Elizando, corroborated the details supplied by Jaramillo and Corcoles. He testified that the employees reacted adversely upon hearing Noyola's announcement. He estimated that approximately a dozen employees complained. As he put it, "[e]verybody said that it wasn't right for, for us, to eat our lunch, our lunches cold." (Tr. 127.)

After hearing expressions of dissatisfaction with the decision to call an early break, Noyola telephoned Valdez. He testified that he told Valdez, "that the employees did not want to go to break." (Tr. 207.) Valdez indicated that he would come to the line. In contrast to Noyola's account of their conversation, Valdez contended that Noyola gave him a much more specific report of what had occurred. He said that Noyola told him that Jaramillo and Corcoles were being "vocal" about the breaktime and were "kind of holding the people there." (Tr. 227.) Upon receiving Noyola's report, Valdez spoke to his superior, Paul Desjardins, the manager of manufacturing operations.

Desjardins testified that Valdez told him that, "the people were not going to leave early. They had indicated they weren't going to take a break early." (Tr. 157.) Desjardins suggested that the two men go out and "see if we could persuade the people to move on to break." (Tr. 157--158.) As the men entered the production area, they observed employees standing by the line. As they approached Line 12, "the employees started to disperse." (Tr. 159.) Both Valdez and Desjardins confirmed that among those employees who began to leave was Corcoles. Another employee, Katherine Miller, asked the managers if she should take a break and she was told to do so.⁷ Valdez reported that he then spoke to Jaramillo who was seated at the line with three other ladies. She complained that the lack of parts was not the fault of the employees and asserted that the managers should do a better job of managing. Valdez suggested that if she felt this way, she should apply for a management position. She responded that she did not feel that she could handle a job like that. Desjardins testified that by this point, it was 9:15, and

⁶ Jaramillo testified that, during the morning break, it is her habit to go to the restroom, wash her hands, and have a drink of water.

⁷ It appears that Miller asked this question because she was uncertain of what had been discussed. The discussions were in Spanish, a language that Miller does not understand.

“people were already coming back to the line.” (Tr. 163.)

Jaramillo and Corcoles confirmed the basic details as reported by the management witnesses. Jaramillo noted that she raised the issue of cold food with Valdez and also suggested that the employees be transferred to another production line. Valdez told her that this would take too long. Jaramillo testified that when the employees heard this response, “they went to break.” (Tr. 22.) Both she and Corcoles went to the bathroom. Corcoles testified that the break ended at 9:05.

There was some disagreement regarding the time that the line started again. All witnesses agreed that the determining factor was the belated arrival of the grills. Corcoles indicated that they started production at 9:05. Jaramillo testified that the grills arrived and they started work at 9:15. Desjardins thought the line resumed at 9:20. Noyola opined that the line began operating between 9:20 and 9:25. He was clear that the startup resulted from the arrival of the missing parts. As he put it, “[t]he employees were already there.” (Tr. 209.) Valdez confirmed this sequence, reporting that once the employees returned from the break, “they still waited another while and then the parts finally got there.” (Tr. 250.) All of the witnesses agree that when the normally scheduled time for the morning break arrived at 9:30, no employees left the line. All continued to work.

Desjardins testified that during his visit to Line 12, Noyola had informed him that two employees had “said they don’t want to go on [break] and told the rest of the people you don’t have to go, don’t go.” (Tr. 160.) Noyola told him that that these two employees were Jaramillo and Corcoles. Shortly after production resumed, Desjardins and Noyola met with Jose Ruiz, the human resources manager. Noyola again reported that Jaramillo and Corcoles “were trying to encourage the people not to work.” (Tr. 210.) Ruiz conferred with the Company’s legal counsel and then met further with Desjardins.

During the course of the morning, management officials continued to discuss their response to the events under consideration. The discussion reached the highest level, the Company’s president, Carl Krause. It was observed that characterization of Jaramillo and Corcoles’ conduct as insubordination would require their termination under the Company’s work rules. This was deemed too drastic a sanction. Ruiz then noted that under the terms of the former collective-bargaining agreement, any employee engaged in “interference with operations” was subject to “immediate suspension or discharge, at the discretion of the Company.” (R. Exh. 1., art. X, sec. 10.) It was decided to utilize this provision as justification for suspension of Jaramillo and Corcoles.⁸

At approximately 11 a.m., Jaramillo and Corcoles were instructed to report to the human resources office. Valdez, Desjardins, and Ruiz were in the office. Jaramillo was called into their presence first.

Ruiz accused Jaramillo of “insubordinating the people so they wouldn’t go to break.” (Tr. 25.) The managers’ testimony was not consistent regarding her response to this allegation. Desjardins reported that she responded that she had refused to go to break, but had not

⁸ I note that this decision still imposed a rather stringent form of discipline. By contrast, had Jaramillo or Corcoles actually failed to return from a scheduled break or taken “breaks other than those scheduled by the Company,” the penalty specified by the Company’s work rules for a first offense was only a verbal warning. Suspension would not be imposed until a third offense. (R. Exh. 2., p. 1.)

encouraged other employees to do so. By contrast, Valdez testified that she said she was in “disagreement [about taking an early break] and that she talked to me about that but she did not refuse to go.” (Tr. 238.) Ruiz reported that Jaramillo said that she “objected to go on break but that she didn’t tell any of her coworkers [not] to go on break.” (Tr. 265.) I credit Valdez and Ruiz on this point. Desjardins testified that he understood no more than minimal amounts of Spanish. The conversations were being conducted in that language. The accounts of the two managers who were fluent in the language are entitled to greater reliance. Those accounts, while not entirely consistent with each other, tend to affirm Jaramillo’s denial of any misconduct, a position she has consistently asserted throughout these events.

Ruiz warned Jaramillo that she could be fired for her conduct and advised her that she was being suspended for the remainder of the workday. She was given an Employee Disciplinary Report for the offense of “interference with company operations.” The report informed her that it “will be used as part of the official record of the employee mentioned.” (GC Exh. 2.) She was also given copies of the Company’s rulebook and the portion of the collective-bargaining agreement that discussed interference with operations. After the meeting, Jaramillo retrieved her belongings and went to the parking lot to wait for Corcoles.

Immediately thereafter, the managers met with Corcoles. Ruiz informed him that, “we are going to give you a warning because you interfered and those are company rules.” (Tr. 76.) Corcoles testified that he denied any interference. Ruiz, Valdez, and Desjardins all testified that Corcoles freely admitted his refusal to take an early break. He also admitted that, along with Jaramillo, he had encouraged other employees to refuse the early break. I credit the managers’ accounts. They are uniform in their content and are consistent with Corcoles’ own admission that he took a confrontational stance during the meeting. This was exemplified by his response when Ruiz told him that he could have been fired for his conduct. Upon hearing this, Corcoles told Ruiz, “that’s okay, do it.” (Tr. 77.)

After this discussion, Ruiz gave Corcoles an Employee Disciplinary Report that was identical to the one issued to Jaramillo. (GC Exh. 4.) He was also given the work rules and portion of the collective-bargaining agreement. After the meeting, Corcoles returned briefly to the line in order to collect his jacket. He then met with Jaramillo and the two employees went to see Leah Fried, field organizer for the Union.

Fried assisted the two employees in preparing a document entitled, “Grievance.” This document recited the events regarding the early break and opined that the Company had “wrongly accused” Jaramillo and Corcoles of “organizing the people for them not to go on break.” It protested their suspension and demanded payment of their lost wages and expungement of their records. It concluded by asserting that Jaramillo and Corcoles “didn’t tell us to ignore the instructions from the supervisors, nor did they try to organize us, for us not to go on break.” (GC Exh. 3.) Twelve employees eventually signed this document. In addition, Fried accompanied Jaramillo and Corcoles to the offices of Region 13 in order to file an unfair labor practice charge arising from the suspensions. (GC Exh. 1(a).)

After their suspensions, Jaramillo and Corcoles were not permitted to perform any additional work on September 19, nor were they paid for the period of their suspension. Both employees returned to work on the next workday, September 22. On that date, a large number of employees attempted to present the grievance document to Ruiz.⁹ Faced with a large crowd,

⁹ Corcoles estimated that there were 50 employees involved in this. Ruiz put the number at 20 to 35 individuals.

Ruiz invited three employees to enter his office as representatives of the entire group. The three selected were Jaramillo, Corcoles, and Maria Lara.

5 In Ruiz' office, the employees presented him with the grievance that had been signed by 12 employees. He opined that the document "was not worth anything," but he agreed to initial it and provide Jaramillo with a copy. (Tr. 83.) He told the employees that there was nothing to be done about the situation because Corcoles had admitted disrupting work operations. Jaramillo responded that, "well, he admitted it but I didn't." (Tr. 273.) Ruiz told the employees to return in 10 2 days for further discussion.

15 Although the further discussion was not held within the timeframe stated by Ruiz, there was an additional meeting in early October. No action resulted from this meeting. On December 18, the Acting Regional Director issued the complaint and notice of hearing in this matter.

B. Legal Analysis

20 The General Counsel contends that the Company's officials violated Section 8(a)(1) of the Act by suspending Jaramillo and Corcoles because those two employees had engaged in concerted activity of a type protected by Section 7 of the Act. The Board has established a specific analytic framework for assessment of such claims. This methodology was described in *Triangle Electric Co.*, 335 NLRB 1037 (2001):¹⁰

25 The [employer's imposition of a sanction against]¹¹ an employee will violate Section 8(a)(1) of the Act if the employee was engaged in concerted activity (i.e. activity engaged in with or on the authority of other employees and not solely on her own behalf), the employer knew of the concerted nature of the 30 employee's activity, the concerted activity was protected by the Act, and the [sanction] was motivated by the employee's protected concerted activity. [Footnote omitted.]

35 335 NLRB at 1038. I agree with counsel for the General Counsel that this so-called "single motive" standard is applicable because the Company does not assert any reason for the imposition of these suspensions other than "interference with company operations." (GC Exhs. 2 and 4.) It is clear that the reference to such interference concerned the conduct of Jaramillo and Corcoles upon being told that their morning break would be taken earlier than usual. The situation is similar to that in *Skyline Lodge*, 305 NLRB 1097, fn. 1 (1992), enf. 983 F. 2d 1068 40 (6th Cir. 1992), where an employee was discharged for being "a disruptive force in the workforce." As the Board noted in holding that the single motive standard applied, this rationale for imposition of sanction was simply "a reference to her protected concerted activities." The same is true here regarding the Company's citation to "interference with company operations."¹²

45 ¹⁰ In an unpublished decision, the Sixth Circuit partially reversed the Board's decision for reasons related to its evaluation of the sufficiency of the evidence. 78 Fed. Appx. 469 (6th Cir. 2003). This partial reversal did not affect the validity of the Board's discussion of the standards applicable to assessment of concerted protected activity cases.

50 ¹¹ *Triangle* involved the sanction of discharge. Imposition of the suspensions in this case requires application of the same analysis.

¹² Because this is not a "dual motive" case, application of the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989

Continued

Turning now to the assessment of the stages of the required analysis, I first conclude that Jaramillo and Corcoles were engaged in concerted activity within the meaning of the Act. At the outset, I note that, in its brief, the Company does not advance any argument suggesting that the conduct of the employees was not concerted activity.¹³

The Board employs a flexible standard in determining the concerted nature of employee activities, recognizing that there are a “myriad of factual situations that have arisen, and will continue to arise, in this area of the law.” *Meyers Industries*, 268 NLRB 493, 497 (1984).¹⁴ Among the factual situations addressed by the Board is the group-meeting context. For example, in *Whittaker Corp.*, 289 NLRB 933 (1988), an employer convened a group meeting of employees to announce that anticipated wage increases would not take place. One employee uttered a spontaneous protest that “implicitly elicited support from his fellow employees against the announced change.” 289 NLRB at 934. The Board held that the protest, made in the presence of coworkers and at the earliest opportunity after the employer’s announcement, constituted the “initiation of group action” such that it was concerted activity within the meaning of the Act. 289 NLRB 934.

In this case, the testimony of Elizando clearly demonstrates the similarity of the circumstances to those described in *Whittaker*.¹⁵ He reported that immediately after Noyola announced the early break, the “reaction was that a, a lot of people weren’t, they weren’t used to taking their break at that time. And eating their lunches cold.” (Tr. 127.) He noted that approximately 12 employees were prompted to engage in this discussion and that “[e]verybody said that it wasn’t right for, for us to eat our lunch, our lunches cold.” (Tr. 127.) It was in this context that Jaramillo and Corcoles made their protests. Those protests were clearly made in concert with each other and with their fellow employees. In addition, the evidence showed that Jaramillo and Corcoles did not eat their own lunches during the morning break. To the extent that their protests involved the lunch issue, they were acting solely on their coworkers’ behalf.¹⁶ I find that Jaramillo and Corcoles’ spontaneous protest of the early break announcement constituted concerted activity engaged in with each other and with their coworkers.

At the next step in the analysis, I must determine whether the employer was aware of the concerted nature of Jaramillo and Corcoles’ activities. It is evident that management had full knowledge of the circumstances. By its very nature, the employees’ protest was designed to come to management’s attention. It was initially directed toward the immediate supervisor, Noyola. After he reported it up his chain of command, both Valdez and Desjardins responded to

(1982) is inappropriate. I note that counsel for the Company does not suggest otherwise.

¹³ This is consistent with counsel’s statement during trial that, “[a]rguably there could be concerted activity but it wasn’t protected in light of the facts that we are going to present to you.” (Tr. 151.)

¹⁴ The extraordinarily lengthy complete citation for this case is *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), decision on remand sub nom. *Meyers Industries, Inc.*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F. 2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

¹⁵ I found Elizando to be a particularly credible informant. He had no direct stake in the proceedings and offered a clear and persuasive account of the events.

¹⁶ As described later in this decision, I also conclude that their protests related to more than the issue of cold lunches. As to their additional concerns about having to take an early break; they were voicing objections on behalf of themselves, each other, and their coworkers.

the worksite where Jaramillo continued her protest in their presence. After the break, all levels of management, including the Company's attorney and its president, discussed the issue. There can be no question that the Company was aware of the concerted activity.

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At the third step, the issue is whether the employees' concerted activity was entitled to the protection of the Act. It is at this stage that the employer musters its defenses. It raises two contentions in arguing that Jaramillo and Corcoles' behavior does not fall within the Act's protection. First, counsel for the Company asserts that the "alleged cold lunch issue is a complete fabrication." (R. Br. at p. 17.) He argues that the issue "was a rationale that arose sometime well after the incident involved," and that it is "unreasonable." (R. Br. at p. 17.) For reasons grounded in both fact and law, I reject the contention that the conduct was unprotected because the cold lunch rationale for the protest was either fictitious or unreasonable.

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The evidence, including testimony from managers themselves, demonstrates that the cold lunch issue was not a fabrication, but rather represented a genuine concern among the employees. It will be recalled that Elizando testified that as many as 12 of the affected workers voiced their immediate concern regarding the impact of the early break on their ability to eat a warm meal. Noyola confirmed that Corcoles raised this issue at the time of the announcement of an early break. Of crucial significance, Valdez testified in a manner that thoroughly validated the employees' concerns about their lunches. Under cross-examination, he reported that at the very time that he ordered Noyola to direct an early break, he instructed him to "make sure that if anybody eats at this time, make sure that you help them out, get their lunches or help them out if that's what they need." (Tr. 249.) In fact, counsel for the General Counsel underscored this point by asking Valdez if he knew that lunches were "a potential concern" for the employees. He responded that,

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[w]e know because when there is a, when a problem like that happens, we always, that's the first thing that comes to our mind, make a phone call to the cafeteria sometimes to tell the lady in the cafeteria that so and so is coming, to have the lunches ready.

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(Tr. 250.) Thus, Valdez affirmed that the issue of warm lunches was not only a concern, but was actually "the first thing that comes to our mind." The evidence completely belies counsel for the Company's contention that the issue of cold lunches was either a fabrication or a post hoc justification for the employees' protest of the early break time.

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Having found the cold lunch issue to be a genuine concern that was raised immediately upon the announcement of the early break, I will now turn to counsel for the Company's claim that it was an unreasonable rationale for Jaramillo and Corcoles' actions. The first response to this argument is that both the Board and the Supreme Court have rejected the concept of an employer defense on the basis of the unreasonableness of the employees' concerted activity.

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The seminal case regarding the right of unrepresented workers to engage in concerted activity is *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). In that case, unrepresented employees walked off the job in protest against the cold temperature at their workplace. The employer argued that this behavior was unreasonable because "the company was already making every effort to repair the furnace and bring heat into the shop." 370 U.S. at 16.

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Acknowledging that this fact "might tend to indicate that the conduct of the men in leaving was unnecessary and unwise," the Court, nevertheless, rejected this defense. It observed that, "it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant." 370 U.S. at 16.

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Interestingly, the Seventh Circuit has recently mused upon the basis for the Board's rejection of a requirement of reasonableness in determining whether concerted activity merits protection. Using an analogy to warfare, the Court noted that,

[w]e understand the Board's concern with imposing a *general* duty of "reasonableness" on workers' choices regarding the timing and nature of concerted activities. The National Labor Relations Act models labor relations as tests of strength between workers and management . . . This "combat" model of labor relations does not sort well with a requirement that the combatants act reasonably. Such a requirement would turn war into a war game constrained by rules that would often baffle the combatants, since the rules would merely be applications of a vague standard of reasonableness to the particular circumstances of particular cases, rules moreover that would be articulated and applied after the game had been played.

Trompler, Inc. v. NLRB, 338 F. 3d 747, 750 (7th Cir. 2003). In sum, the law does not countenance the argument that a protest about cold food was so unreasonable as to forfeit protection under the Act.

Leaving aside considerations of law and policy, I also note that the evidence demonstrates that the protest against the early break was entirely reasonable.¹⁷ Certainly, the Company had recognized the value of hot meals for its employees by providing a cafeteria with ovens and by assigning an employee to the task of heating the lunches. Valdez underscored management's recognition of the value of this service by noting that dealing with the hot lunches was the "first thing that comes to our mind" in the event that schedule changes become necessary. (Tr. 250.) The fact that Valdez believed that Noyola would address the issue does not alter the conclusion that the concern was reasonable. Elizando testified that after the protest he visited the cafeteria. While he was there, several employees complained that their lunches were cold.

In addition to finding the hot lunch issue to be a reasonable employee concern, I conclude that counsel for the Company takes too narrow a view of the nature of the workers' protests against an early break time. Valdez testified that Line 12 is a "moving belt conveyor" that operates in a "continuous" manner. (Tr. 253, 254.) Jaramillo and Corcoles testified that they use their morning breaks to go the bathroom and obtain a drink of water. Imposition of an early break means that there will be an unusually long period between that break and the next rest period, the lunch break. In this regard, I completely agree with the views of another administrative law judge who noted that,

[s]cheduled break periods are not trivial matters. They are important, especially to those who work on assembly lines and may have little or no other opportunity to attend to personal needs during their shifts.

¹⁷ In reaching this conclusion, I do not suggest that management's decision to order an early break in an effort to minimize loss of production due to lack of parts was unreasonable. As is so often true in litigation, competing reasonable visions of reality may contend against each other.

Accel, Inc., 339 NLRB No. 134 (2003), slip op. at 6.¹⁸ It is simply common sense to conclude that when the workers on Line 12 expressed annoyance at having to take an early break, their viewpoint was readily understandable and entirely rational.

For these reasons of both law and fact, I have rejected the employer's argument that Jaramillo and Corcoles lost the Act's protection because their protests were unreasonable. The employer asserts another argument in support of the view that the protests were not entitled to the status of protected activity. Counsel for the Company contends that by refusing to take their break and by encouraging others to similarly refuse to take the early break, Jaramillo and Corcoles were engaged in an insubordinate attempt to set their own conditions of employment. The Company cites a line of Board precedents holding that defiance of an employer's work orders or rules may constitute unprotected insubordination. (R. Br. at 18--19.) For example, in *House of Raeford Farms, Inc.*, 325 NLRB 463 (1998), employees disobeyed an order to remain on duty. The Board found their conduct in leaving the workplace to be unprotected. It based this conclusion on a finding that the employees were motivated to leave "by a desire to start the Thanksgiving holiday early." 325 NLRB at 463. Such behavior was characterized as "attempting to determine unilaterally their terms and conditions of employment, conduct which is not protected by the Act." 325 NLRB at 463.

Once again, I conclude that both the law and the facts do not support the Company's argument. Examining the facts, it is important to consider what did not happen during the employees' protest. There was no profanity or threatening behavior directed toward the supervisors. After articulating their protests, the employees, including both Jaramillo and Corcoles, took their break. This was highlighted during counsel for the General Counsel's examination of Elizando:

COUNSEL: After this conversation, did employees take their breaks?

ELIZANDO: Yes.

COUNSEL: Okay. And did everyone return to the line after break?

ELIZANDO: Yes.

COUNSEL: And did anyone discuss it further with Supervisors after they returned?

ELIZANDO: No.

(Tr. 130-131.) Of crucial importance, both Valdez and Ruiz testified that when the time came for the normal break period at 9:30, nobody ceased working. Given this uncontroverted evidence regarding the nature and extent of the employees' behavior, counsel for the General Counsel asked Desjardins the question that illuminated the fundamental point in this case. She enquired:

COUNSEL: And so, your issue with what happened isn't that

¹⁸ In fact, while affirming the judge, the Board stated that, "we agree with the judge that the denial of a scheduled work break is not a trivial matter." 339 NLRB No. 134, slip op. at 1.

they really refused to do anything, it's what they said about it?

DESJARDINS: Yes.

5 (Tr. 187.) It is clear that, in reality, the employees, including Jaramillo and Corcoles, did nothing to disrupt the Company's operations. Indeed, they took no action whatsoever. They merely expressed their protest at what they felt was a bad management decision. As the Board has noted, "[i]t is well-settled Board law that concerted employee protests of supervisory conduct are
10 protected under Section 7 of the Act where such protested conduct affects the employees' working conditions." *Trompler, Inc.*, 335 NLRB 478, 479 (2001), enf. 338 F. 2d 747 (7th Cir. 2003).

15 Even if one were to conclude (as I do not) that Jaramillo and Corcoles' behavior caused employees to delay taking their breaks, such conduct does not fall outside the Act's protection. In a recent decision, the Board reiterated its views regarding conduct that could cost an employee the protection of the Act. Citing a variety of precedents, it observed that,

20 the Board has recognized that not every impropriety committed during concerted activity places the employee outside the protection of Section 7, and the employee's right to engage in concerted activity must permit some leeway for impulsive behavior, nevertheless, under certain circumstances, concerted activity may lose the Act's protection. When an employee is
25 discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is so egregious as to take it outside the protection of the Act. [Citations omitted.]

30 *American Steel Erectors, Inc.*, 339 NLRB No. 152 (2003), slip op. at 3. Nothing in Jaramillo or Corcoles' conduct was egregious in any manner. Their words, while forceful, were entirely peaceful. Even viewing their conduct in the sternest light, it was not out of bounds, nor did it result in any disruption of the Company's production. It was clearly more benign than conduct the Board excused in *Louis G. Freeman Co.*, 270 NLRB 80 (1984). In that case, it was noted
35 that even a "temporary failure to comply with an order to return to work after a heated exchange in the course of a grievance meeting may fall within the protection of the Act." 270 NLRB at 81, citing *Postal Service*, 251 NLRB 252 (1980), enf. 652 F. 2d 409 (5th Cir. 1981).

40 In another relatively recent case, the Board extended the Act's protection to employees who engaged in a considerably more vigorous act of protest. In *Benesight, Inc.*, 337 NLRB 282 (2001), unrepresented customer service employees became upset at newly imposed work procedures that they believed to be unduly burdensome. During a break period, they conferred with each other and decided to stop taking customer calls "until they could get a resolution of their problem from management." 337 NLRB at 286. Their work stoppage lasted for 15 to 20
45 minutes and resulted in a failure to respond to 56 customer calls. Subsequently, employees were discharged. The Board ordered their reinstatement concluding that,

50 when an in-plant work stoppage is peaceful, is focused on a specific job-related complaint, and causes little disruption of production by those employees who continue to work, employees are "entitled to persist in their in-plant protest for a reasonable period of time." [Citation omitted.]

337 NLRB 282. In an accompanying footnote, the Board observed that various Circuit Courts have approved this analysis.¹⁹

Under the Board's standard articulated in *Benesight*, I have no difficulty in finding that the employee protest in this case, an activity that was brief, entirely peaceful, and conducted in a manner that resulted in no disruption of production by either the protestors or any other workers, was entitled to receive protection under the Act.

The final step in the analytical process is the determination of whether the employer's suspensions of Jaramillo and Corcoles was motivated by their having engaged in protected concerted activity. I have already concluded that there is no issue of dual motivation. In other words, the Company does not advance any reason in support of the suspensions other than its conclusion that the employees' conduct disrupted company operations. This is merely another way of saying that the employees' were suspended because they engaged in the very activity that I have already determined was both concerted and protected by the Act.

Before concluding my legal analysis, it is worthwhile to examine precedents involving employee protests against changes in policy affecting work breaks. As is so often true given the long history of the Act, the situation presented by this case is not entirely unique. The Board's response to similar circumstances in the past sheds powerful illumination on the proper disposition of this controversy.

In *P.B. and S. Chemical Co.*, 224 NLRB 1 (1976), enf. denied in pertinent part, 567 F. 2d 1263 (4th Cir. 1977), an employee had commenced working earlier than normally required. He requested permission to take an early break. The foreman agreed, but noted that he would not be permitted to take an additional break later on. The employee took the early break and was observed by a higher management official. Despite being assured by the foreman that the early break had been authorized, this manager began to question the employee. An argument ensued and the employee, accompanied by a fellow employee, left work without permission. The Board, refusing to address the reasonableness of the employees' decision to walk out, held that the "walkout constituted protected concerted activity which, if shown to be a cause in the discharges here, requires a finding that Respondent's action violated Section 8(a)(1) of the Act." 224 NLRB at 2.

Eight years after this decision, the Board addressed a significantly different form of employee protest over break policy. In *Bird Engineering*, 270 NLRB 1415 (1984), the employer issued a new rule prohibiting employees from leaving the workplace during their lunch break. No union represented the workers. Several employees took issue with the new policy and chose to leave the premises for lunch. When they returned from the lunch break, they were informed that they had been discharged. The Board noted that, "there is no question that the issue of lunch break policy is a condition of employment of common concern to all employees." 270 NLRB at 1415. It found that the discharged workers had engaged in concerted activity. Nevertheless, it declined to afford them protection under the Act. It concluded that, "[b]y treating the rule as a nullity and following their pre-rule lunchtime practice they did not participate in a legitimate protected exercise but rather engaged in insubordination." 270 NLRB at 1415.

In a case bearing a striking similarity to the one under consideration, workers were rendered unable to continue production due to a mechanical breakdown. The superintendent

¹⁹ Among the decisions cited was *Golay & Co. v. NLRB*, 371 F. 2d 259 (7th Cir. 1966), cert. denied 387 U.S. 944 (1967).

instructed the employees to take an early lunch break while repairs were performed. The employees refused, and continued to “stand around in groups on the [shop] floor waiting for the equipment to be repaired.” *SDC Inv.*, 299 NLRB 779, 780. A manager then informed the employees that they “had the choice of taking an early lunch break or of going home and not coming back to work.” 229 NLRB at 780. In a decision that was affirmed by the Board, an administrative law judge concluded that the employer’s threat of discharge violated Section 8(a)(1) of the Act since, “the record shows that the employees’ concerted refusal to take an early lunch break on June 14 was the type of concerted activity protected by Section 7 of the Act.” 229 NLRB at 785.

Finally, and very recently, the Board addressed this issue in *Accel, Inc.*, 339 NLRB No. 134 (2003). In that case, unrepresented employees on the night shift were scheduled to take a work break at 11:30 p.m. Just prior to break time, a supervisor observed a large number of rejected products on the shop floor. He ordered the employees to remain at their workstations and work on the rejects. By the time the rejects had been repaired, the break period had come and gone. An employee asked the supervisor whether they could take their break at that point or receive an extension of their next scheduled break. When told that they could not, “[e]mployees working on line 4 began talking loudly about being denied the break, and then a group walked away from the work area.” 339 NLRB No. 134, slip op. at 3. The employees who engaged in the walkout were discharged for refusing to perform assigned work tasks. The Board, citing *P. B. and S. Chemical Co.*, supra, held that “[t]he judge, correctly applying Board law, found that eight employees who walked off their assembly line to protest the Respondent’s decision to deny them a scheduled work break engaged in protected activity, and, thus, that the Respondent violated Section 8(a)(1) by discharging them for their work stoppage.” 339 NLRB No. 134, slip op. at 1. In reaching this conclusion, the Board rejected the employer’s argument that “the work stoppage was unprotected because it was a disproportionately disruptive response to a trivial grievance.” *Ibid.* In so doing, the Board noted, “there is no indication that the walkout had the immediate consequence of a loss of business, customers, or income.” *Ibid.*

It is evident to me that the Board’s precedents mandate a finding that Jaramillo and Corcoles engaged in protected concerted activity. Their grievance related to a significant term and condition of their employment. The manner in which they conducted their protest was circumspect and carefully limited. Their conduct did not approach, let alone cross, the line into insubordination or into an attempt to set their own conditions of employment. Finally, their method of protest did not produce even the slightest interruption of their employer’s operations or production. By suspending them for this mild form of protest, the Company violated their rights under the Act.

Conclusions of Law

By protesting the decision to require employees to take an early break, Martha Jaramillo and Alejandro Corcoles, along with other employees, engaged in protected concerted activity. The Company was aware of the employees’ activity and suspended Jaramillo and Corcoles due to their participation in that activity. As a result, I conclude that the Company’s actions in imposing suspensions on Jaramillo and Corcoles violated Section 8(a)(1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having unlawfully suspended its employees, Martha Jaramillo and Alejandro Corcoles, it must be ordered to make them whole for any loss of earnings and other benefits, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). It shall also be ordered to remove from its files any reference to the unlawful suspensions of these employees.

I shall also recommend that the Respondent be ordered to post an appropriate notice in the usual manner. Although not specifically requested by the General Counsel or Charging Party, I also recommend that the Respondent be ordered to post copies of this notice in Spanish. The evidence revealed that a great number of the Respondent's employees speak Spanish as their primary language. Among these, some are not fluent in English. Furthermore, the record showed that the Respondent conducts much of its business with its employees in the Spanish language. For these reasons, posting of the notice in that language is necessary to effectuate the purposes of the Act. See: *Amber Foods, Inc.*, 338 NLRB No. 84 (2002), slip op. at fn. 2.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰

ORDER

The Respondent, Lakewood Engineering and Manufacturing Company, of Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending or otherwise disciplining Martha Jaramillo and Alejandro Corcoles, or any other of its employees, for engaging in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Martha Jaramillo and Alejandro Corcoles whole for any loss of earnings and other benefits suffered as a result of the unlawful suspensions imposed against them in the manner set forth in the remedy section of the Decision.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspensions, and within 3 days thereafter notify the employees in writing that this has been done and that the suspensions will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated

²⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post in both English and Spanish at its facility in Chicago, Illinois copies of the attached Notice marked "Appendix."²¹ Copies of the Notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, copies of the Notice in both English and Spanish to all current employees and former employees employed by the Respondent at any time since September 19, 2003.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 24, 2004

Paul Buxbaum
Administrative Law Judge

²¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT suspend or otherwise discipline Martha Jaramillo, Alejandro Corcoles, or any other employees because they engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL make Martha Jaramillo and Alejandro Corcoles whole for any loss of earnings and other benefits resulting from their suspensions, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspensions of Martha Jaramillo and Alejandro Corcoles, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions will not be used against them in any way.

Lakewood Engineering and Manufacturing Company

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

200 West Adams Street, Suite 800, Chicago, IL 60606-5208

(312) 353-7570, Hours: 8:30 a.m. to 5 p.m.

JD-65-04
Chicago, IL

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170.